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A

Mohd Mazizan bin Manan v Public Prosecutor

B COURT OF APPEAL (PUTRAJAYA) — CRIMINAL APPEAL NO W-05–291–11 OF 2012
ABDUL WAHAB PATAIL, ROHANA YUSUF AND ZAKARIA SAM JJCA
19 JUNE 2014

C *Criminal Law — Dangerous drugs — Trafficking — Trafficking in 859.58g of cannabis — Conviction and sentence — Appeal against — Accused leading police to drugs kept in the kitchen — House shared with friends — Whether control and possession proven — Whether caution properly administered — Whether failure to call particular witness jeopardised prosecution's case* D *— Conviction secure — Appeal dismissed*

Inspector Haszaruddin ('SP4') having received information on drugs activity led a raiding team at an unnumbered house. Upon entering the house SP4 found the appellant, one Saipul and one Fares ('SP7') sitting inside. SP4 E administered a caution statement under s 37A(1)(b) of the Dangerous Drugs Act 1952 ('the DDA') to them. According to SP4, he asked whether any of them was keeping dangerous drugs in the house and the accused gave a reply and led SP4 to the kitchen. From a bed in the kitchen, the accused took three compressed slabs wrapped in white paper and transparent plastic, then handed F them to SP4. The three compressed slabs were found to contain 859.58g of cannabis. The appellant was charged for trafficking in dangerous drugs, an offence under s 39B(1)(a) of the DDA. The appellant claimed that he shared the house with his friend, Ismail. The appellant said many friends often came to his house to chit chat and to watch television. The appellant denied G knowledge of the presence of the three slabs in the house. He further denied that he handed the cannabis to the police but instead said he was forced to do so by the police. Ismail who had arrived during the raid was also arrested along with the appellant. The appellant was convicted and sentenced to the mandatory death sentence. The appellant appealed against conviction and H sentence on the grounds that: (a) there was lack of control and possession to constitute a charge of trafficking, in view of the fact that the house was accessible to anyone; (b) the administration of caution done by PW4 was questionable because SP4 testified that he read the caution from the card he kept in his pocket but the card was however not produced as evidence; (c) the I failure to call Saipul as a witness or the failure to tender his s 112 statement was fatal and such failure did not exclude others such as Saipul and his brother, who could have concealed the cannabis on the bed in the house.

Held, dismissing the appeal and affirming the conviction and sentence:

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(1) The issue about the house could not be locked from outside was by the learned trial judge ('the judge'). The judgment of the judge revealed her meticulous assessment of the evidence on the issue of proving possession and had paid particular attention to the evidence that the house was accessible to all and sundry. The judge made her finding of facts that the evidence adduced in totality pointed to the fact that the drugs were found on a mattress in a house, proved to be tenanted to the appellant (see paras 15–16).

(2) Saipul and Fares were remanded and released after the remand period. SP6 explained why Saipul was not called to testify. Attempts to serve subpoena failed. The absence of Saipul did not jeopardise the prosecution's case. In any event the decision to adduce the form and nature of evidence lie with the prosecution (see para 17).

(3) SP4 said he administered the caution by reading a piece of card that was kept in his wallet. At the trial SP4 read out the said card which the court noted to be the correct words of caution in accordance with s 37A(1)(b) of the DDA (see para 18).

(4) The defence's case was properly scrutinised by the judge. The defence's case that the house was shared with Ismail was never put at the prosecution stage but was only raised in the defence case gave low probative value. No question was put to the IO or the landlord (PW5) on Ismail despite it being central and essential to the defence case. The judge found the defence raised was a mere afterthought and that it did not cast a doubt on the prosecution case (see para 21).

[Bahasa Malaysia summary

Inspektor Haszaruddin ('SP4') setelah menerima maklumat mengenai aktiviti dadah mengetuai pasukan menyerbu di rumah yang tidak bernombor. Apabila memasuki rumah SP4 mendapati perayu, Saipul dan Fares ('SP7') duduk di dalamnya. SP4 melaksanakan pernyataan beramaran di bawah s 37A(1)(b) Akta Dadah Berbahaya 1952 ('ADB') kepada mereka. Mengikut SP4, dia bertanya sama ada salah seorang daripada mereka menyimpan dadah berbahaya di dalam rumah dan tertuduh memberi jawapan dan membawa SP4 ke dapur. Dari katil di dalam dapur, tertuduh mengambil tiga papak mampat yang dibalut dengan kertas putih dan plastik lutsinar, kemudian menyerahkannya kepada SP4. Ketiga-tiga papak mampat tersebut didapati mengandungi 859.58g kanabis. Perayu dituduh mengedar dadah berbahaya, kesalahan di bawah s 39B(1)(a) ADB. Perayu mendakwa bahawa dia berkongsi rumah dengan kawannya, Ismail. Perayu menyatakan ramai kawan selalu datang ke rumahnya untuk berborak dan menonton televisyen. Perayu menafikan mempunyai pengetahuan terhadap kehadiran ketiga-tiga papak di dalam rumah. Dia menafikan selanjutnya bahawa dia menyerahkan kanabis kepada polis tetapi sebaliknya menyatakan dia dipaksa berbuat sedemikian

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oleh polis. Ismail yang tiba semasa serbuan juga ditangkap bersama perayu. Perayu disabitkan dan dijatuhkan hukuman mati mandatori. Perayu merayu terhadap sabitan dan hukuman atas alasan bahawa: (a) tidak terdapat kawalan dan milikan untuk membentuk tuduhan pengedaran, mengambil kira fakta bahawa rumah tersebut boleh diakses oleh sesiapa pun; (b) pelaksanaan amaran yang dilakukan oleh PW4 boleh dipersoalkan kerana SP4 memberikan keterangan bahawa dia membaca amaran daripada kad yang disimpan dalam poketnya tetapi kad tersebut walau bagaimanapun tidak dikemukakan sebagai keterangan; (c) kegagalan untuk memanggil Saipul sebagai saksi atau kegagalan untuk menyerahkan pernyataan s 112 nya adalah serius dan kegagalan sedemikian tidak mengecualikan orang lain seperti Saipul dan saudara lelakinya, yang mungkin menyembunyikan kanabis di atas katil di dalam rumah.

Diputuskan, menolak rayuan dan mengesahkan sabitan dan hukuman:

(1) Isu mengenai rumah tidak boleh dikunci dari luar dibincangkan oleh hakim perbicaraan ('hakim') dengan betul. Penghakiman hakim menunjukkan penaksiran begitu teliti terhadap keterangan atas isu membuktikan milikan dan telah memberi perhatian tertentu kepada keterangan bahawa rumah boleh semua dimasuki orang. Hakim membuat dapatan faktanya bahawa keterangan yang dikemukakan secara keseluruhannya menunjukkan fakta bahawa dadah dijumpai di atas tilam di dalam rumah, dibuktikan ada kaitan dengan perayu (lihat perenggan 15–16).

(2) Saipul dan Fares ditahan dan dibebaskan selepas tamat tempoh penahanan. SP6 menjelaskan mengapa Saipul tidak dipanggil untuk memberi keterangan. Percubaan untuk menyerahkan sepina gagal. Ketidakhadiran Saipul tidak membahayakan kes pihak pendakwaan. Walau bagaimanapun keputusan untuk mengemukakan bentuk dan sifat keterangan terletak ke atas pihak pendakwaan (lihat perenggan 17).

(3) SP4 menyatakan yang dia melaksanakan amaran dengan membaca sekeping kad yang disimpan di dalam dompetnya. Pada masa perbicaraan SP4 membaca kad tersebut yang mana mahkamah mengakui perkataan-perkataan beramaran yang betul mengikut s 37A(1)(b) ADB (see para 18).

(4) Kes pembelaan diteliti dengan betul oleh hakim. Kes pembelaan bahawa rumah dikongsi dengan Ismail tidak pernah dikemukakan semasa peringkat pendakwaan tetapi hanya dibangkitkan dalam kes pembelaan memberi nilai probatif yang rendah. Tiada soalan diajukan kepada pegawai penyiasat atau tuan rumah (PW5) ke atas Ismail meskipun ia sebagai perkara utama dan penting kepada kes pembelaan. Hakim mendapati pembelaan membangkitkan sesuatu yang difikirkan

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kemudian dan bahawa ia tidak membangkitkan kesangsian ke atas kes pendakwaan (lihat perenggan 21).]

Notes

For cases on trafficking, see 4(1) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 763–910.

Cases referred to

Abdullah Zawawi bin Yusoff v PP [1993] 3 MLJ 1; [1993] 4 CLJ 1, SC (refd)
Alcontara a/l Ambross Anthony v PP [1996] 1 MLJ 209; [1996] 1 CLJ 705, FC (refd)
Chua Keem Long v PP [1996] 1 SLR 510, HC (refd)
Francis a/l Anthonysamy v PP [2003] 2 MLJ 49; [2005] 2 AMR 750, CA (refd)
Jazuli bin Mohsin v PP [1990] 2 MLJ 190, HC (refd)
Lee Ah Seng Bhd & Anor v PP [2007] 6 MLJ 1, FC (refd)
Lee Chee Meng v PP [1992] 1 MLJ 322; [1992] 1 CLJ (Rep) 43, SC (refd)
Muhammed bin Hassan v PP [1998] 2 MLJ 273; [1998] 2 CLJ 170, FC (refd)
PP v Denish a/l Madhavan [2009] 2 MLJ 194; [2009] 2 CLJ 209, FC (refd)
PP v Mohd Radzi bin Abu Bakar [2005] 6 MLJ 393; [2006] 1 CLJ 457, FC (refd)

Legislation referred to

Dangerous Drugs Act 1952 ss 37A(1)(b), 39B(1)(a), (b), 39B(2),

Hisyam Teh Poh Teik (Teh Poh Teik & Co) for the appellant.
Asmah bt Musa (Kee Wei Lon with her) (Deputy Public Prosecutor, Attorney General's Chambers) for the respondent.

Rohana Yusuf JCA (delivering judgment of the court):

[1] The appellant, Mohd Mazizan bin Manan was charged and tried at the Kuala Lumpur High Court for trafficking in dangerous drugs, an offence under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). At the end of the trial the appellant was convicted and sentenced to death under s 39B(2) of the same Act.

[2] On 5 December 2013, we heard his appeal. By a unanimous decision we dismissed the appeal and we now give our reasons for our decision.

FACTS OF THE CASE

[3] In brief the facts leading to the concoction of the appellant are there. Insp Haszaruddin bin Kamaruzzaman ('SP4') having received information on drugs activity led a raiding team at an unnumbered house beside house

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No 79A, Jalan Sg Besi, Kg Muhibbah, Cheras on 10 June 2011. The team arrived at 8.30pm. The house was lighted. It has only one entrance which comprises a wooden door and a grill door that were both opened.

[4] Upon entering the house SP4 found three Malay men sitting on the sofa watching television in the living room. They were subsequently identified as the appellant, Saipul Ridzuan bin Md Daud ('Saipul') and Fares Affendi bin Kamaruddin ('SP7'). SP4 identified himself and conducted a body search on each of them. No incriminating items were however found.

[5] SP4 administered a caution statement under s 39B(1)(b) of the DDA, to them. SP4 then asked whether any of them was keeping dangerous drugs in the house. According to SP4, the accused gave a reply and led SP4 to the kitchen area of the house. On the left side of the kitchen was a single bed. The accused went towards the bed and took three compressed slabs wrapped in white paper and transparent plastic, then handed them to SP4. SP4 observed that the two sides of each slab were cut and he could see the contents of the slabs. A further search was conducted on the house but no other incriminating items were found.

[6] The three compressed slabs were sent to the Chemist Department for analysis and were found to contain a net weight of 859.58g of cannabis.

[7] At the end of the prosecution case the learned trial judge found that a prima facie case was made out. The appellant was called to enter his defence. The appellant elected to give evidence on oath.

THE DEFENCE

[8] The appellant said he was working as despatch rider with Top Speed Marketing Sdn Bhd in Kepong drawing a monthly salary of RM1,200. He was living in an unnumbered house in Kg Muhibbah, Jalan Sg Besi. The house is a squatter house and a 'rumah bujang'. By 'rumah bujang' he meant that it was lived in by more than one person. According to the accused he did not rent the house by himself but shared with his friend, Ismail bin Yaacob. Ismail was a despatch with a company called RMZ Express Sdn Bhd at Taman Sri Manja. The appellant said many friends often came to his house to 'lepak', to chit-chat and to watch television. The regulars were Pali, Jai and Adi. He however could not provide their full names.

[9] The appellant denied knowledge of the presence of the three slabs in the house. He further denied that he handed the cannabis to the police but instead said he was forced to do so by the police. According to the appellant after he and the two others were arrested, they were put inside a white van which was

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without any logo. Whilst in the van, he saw Ismail returned on his motorcycle. Ismail had attempted to run away but was stopped by the police. Ismail was then brought to the same van where the appellant was.

[10] The appellant denied making admission to anyone about the drugs that were seized by the police. He claimed that when the investigating officer questioned him at the *balai*, he had explained that he rented the house with Ismail and that he suspected that the drugs belonged to Ismail.

[11] At the end of the defence case the learned judge found that the defence failed to cast a doubt on the prosecution case. The appellant was convicted and sentenced to the mandatory death sentence.

[12] Two main grounds were raised by the appellant on appeal. First, it was submitted that the learned judge erred in finding that a prima facie case was established and secondly the learned trial judge failed to appreciate the defence adequately.

[13] Related to prima facie case, learned counsel raised issues on lack of control and possession to constitute a charge of trafficking, in view of the fact that the house is accessible to anyone. Next, learned counsel questioned the administration of caution done by PW4. He further contended that the failure to call Saipul as a witness or the failure to tender his s 112 statement is fatal.

[14] The submission of learned counsel that the appellant has no control, custody and knowledge of the drugs was premised on the fact the house could not be locked from outside and was accessible to anyone. This according to him is substantiated by the fact that the neighbour of the appellant was the one who opened the door to the IO ('SP6') when he came to conduct investigation. Learned counsel Encik Hisyam Teh Poh Teik submitted that the learned trial judge failed to take into account all these facts. Such failure did not exclude others such as Saipul and his brother, who could have concealed the cannabis on the bed in the house.

[15] We find the issue raised here are much issues relating to finding of facts by the learned trial judge. We agree with the learned DPP (Puan Asmah bt Musa) that the issue about the house could not be locked from outside was by the learned trial judge at paras 93–94 of her judgment. While bearing that fact in mind the learned trial judge took into account the prosecution's case as a whole and in particular how the drugs were recovered. The learned judge rightly inferred that '... the owner of drugs would not have left such valuable items in a house which cannot be properly locked unless he was physically present at the time.' Our reading of the judgment of the learned judge reveals

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her meticulous assessment of the evidence on the issue of proving possession and had paid particular attention to the evidence that the house is accessible to all and sundry.

[16] In her judgment at paras 56–64 Her Ladyship had also analysed the applicable decided authorities relating to the issue on the need to prove actual possession. She had analysed and applied the test in *Muhammed bin Hassan v Public Prosecutor* [1998] 2 MLJ 273; [1998] 2 CLJ 170, *Public Prosecutor v Mohd Radzi bin Abu Bakar* [2005] 6 MLJ 393; [2006] 1 CLJ 457 and juxtaposed with the authorities relating to exclusivity of possession such as *Lee Chee Meng v Public Prosecutor* [1992] 1 CLJ (Rep) 43, *Abdullah Zawawi bin Yusoff v Public Prosecutor* [1993] 3 MLJ 1; [1993] 4 CLJ 1 and *Public Prosecutor v Denish a/l Madhavan* [2009] 2 MLJ 194; [2009] 2 CLJ 209 and finally the learned trial judge made her finding of facts that the evidence adduced in totality point to the fact that the drugs were found on a mattress in a house, proved to be tenanted to the appellant. Her finding was made in the light of the testimony of the landlord ('SP5') and evidence such as; that the house was tenanted to the appellant for the last four years before the incident at a rental of RM200 per month; to the best of his knowledge PW5 testified that the appellant was staying alone in the house; the important piece of evidence that of great significance as found by the learned trial judge was the act of the appellant going to the rear portion of the house taking three compressed slabs found to contain cannabis and handing them to PW4.

[17] The other two persons arrested together were Saipul and Fares. They were remanded and released after the remand period. SP6 explained why Saipul was not called to testify. An attempt to serve subpoena failed. SP6 met Saipul's mother who said Saipul had gone to work. The telephone call made by the mother to him was terminated. SP6 tried to call several times but failed. Massages were left on the phone and attempt to serve subpoena through the mother also failed. The learned judge accepted the explanation and efforts on trying to bring Saipul. In her finding on the evidence available before her, the absence of Saipul does not jeopardise the prosecution's case. In any event the decision to adduce the form and nature of evidence lie with the prosecution as decided in *Jazuli bin Mohsin v Public Prosecutor* [1990] 2 MLJ 190, *Chua Keem Long v Public Prosecutor* [1996] 1 SLR 510.

[18] Learned counsel next raised issue on the administration of cautioned statement by SP4. SP4 testified that he read the caution to all the 3 in the hall from the card he kept in his pocket. The card was however not produced as evidence. The appeal records also do not show the words of caution read by SP4. Thus learned counsel argued that it would not be known whether the caution was correctly administered. Learned counsel relied on the Federal Court decision in *Francis a/l Anthonysamy v Public Prosecutor* [2003] 2 MLJ

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49; [2005] 2 AMR 750. It was held in that case that there should be evidence of the actual words used for the court to determine whether the caution was administered as prescribed or to the like effect or is something different.

[19] In this regard we found that the learned trial judge noted in her judgment that SP4 said he administered the caution by reading a piece of card that was kept in his wallet. At the trial SP4 read out the said card which the court noted to be the correct words of caution in accordance with s 37A(1)(b) of the DDA. We have no reason to intervene with this finding of fact made by the learned trial judge who had the audio visual advantage of the oral testimony before her. An appellate court will only intervene on compelling reasons (see *Lee Ah Seng Bhd & Anor v Public Prosecutor* [2007] 6 MLJ 1).

FAILURE TO APPRECIATE DEFENCE

[20] The second main ground of appeal is the lack in appreciation of defence case by the learned trial judge. The essence of defence case was that he had no knowledge of the presence of drugs in the house in the light of these facts;

(a) the house was accessible to others;

(b) the inability of the appellant to name or to give full name of persons frequenting the house such as Pali, Jai and Adi is not unusual;

(c) PW7 confirmed that he heard Mail was arrested;

(d) though certain part of the defence was not put to the prosecution but the core of the appellant's defence was already put; and

(e) the failure to recognise the appellant's right to remain silent.

[21] We agree with the learned DPP that the defence's case was properly scrutinised by the learned judge as reflected in her judgment in paras 65–79. The defence's case that the house was shared with Ismail bin Yaacob was never put at the prosecution stage but was only raised in the defence case gives low probative value (see *Alcontara a/l Ambross Anthony v Public Prosecutor* [1996] 1 MLJ 209; [1996] 1 CLJ 705). No question was put to the IO or the landlord ('PW5') on Ismail despite it being central and essential to the defence case. The learned trial judge also noted that from a totality of the defence case the most important aspect was that he was not the only tenant in the house. The learned trial judge noted in specific term of this fact and had weighed it against other evidence, inter alia; there was the only bed in the house, the appellant was the one dutifully paying rental every month, and no one would want to leave valuables in a house that is accessible to anyone. The learned judge then found the defence raised was a mere afterthought and that it does not cast a doubt on the prosecution is case.

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[22] The learned judge further found the appellant's assertion that he had told the IO that he shared the house with Ismail was doubtful. In her judgment she observed that if that defence was true there is no reason why the appellant did not bring it out and cross-examined the prosecution witnesses on the same. Had the appellant told the IO it would not be difficult for an investigation to at least ascertain personal belongings of Ismail in the house. As such, we are of the view that the learned judge rightly concluded that the defence was a mere afterthought. We agree with the learned judge finding on the facts and reasons given by her. A decision and finding made upon sound reasoning gives little room to be disturbed at the appellate stage.

[23] In conclusion we do not find merit in the grounds raised by the appellant. We do not find any appealable error committed by the learned judge. On the evidence as appeared in the appeal records we find the conviction of the appellant safe. We therefore dismissed the appeal and affirmed the conviction and sentence imposed by the High Court.

Appeal dismissed and conviction and sentence affirmed.

Reported by Kanesh Sundrum